IN THE SUPREME COURT OF MISSOURI
No. SC 87559

RANDALL D. PETERS, Individually
and as Next Friend for Constance Marie Peters,
Respondent,

v.

GENERAL MOTORS CORPORATION,
Appellant.

Appeal From the Circuit Court of Jackson County
Honorable Marco A. Roldan, Judge

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

AND

MISSOURI ORGANIZATION OF DEFENSE LAWYERS IN SUPPORT OF APPELLANT

CARLTON FIELDS, P.A.
Wendy F. Lumish (*pro hac vice*)
Jeffrey A. Cohen (*pro hac vice*)
4000 International Place
100 SE 2nd Street
Miami, FL 33131
(305) 530-0050 (Phone)
(305) 530-0055 (Fax)

SHOOK HARDY & BACON, L.L.P.
Robert T. Adams
2555 Grand Blvd.
Kansas City, Missouri 64108
(816) 474-6550 (Phone)
(816) 421-5547 (Fax)

Attorneys for Amicus Curiae
Product Liability Advisory Council, Inc.

FORD, PARSHALL & BAKER, LLC
Susan Ford Robertson
P.O. Box 1097
609 E. Walnut
Columbia, MO 65205-1097
Phone: (573) 449-2613
Fax: (573) 875-8154

Attorney for Missouri Organization of Defense Lawyers

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INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 133 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 725 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Appendix.

The Missouri Organization of Defense Lawyers (“MODL”) is a private, voluntary association of Missouri attorneys dedicated to promoting improvements in the administration of justice and to optimizing the quality of the services which the legal profession renders to society. To that end, MODL members work to advance and exchange information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to evaluate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil

litigation, including individuals. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

The Court faces a number of issues that have broad application in Missouri courts, and thus, this case is important to the membership of PLAC and MODL. If affirmed, the trial judge's decision to admit evidence of other incidents of indeterminate cause will embolden other products liability plaintiffs to seek to predicate liability the same way. The cost to the parties, not to mention the judiciary, of effectively trying several lawsuits in every products liability case would be enormous.

This case involves another issue common to many of PLAC's members whose products are regulated by the federal government. Many federal agencies conduct safety investigations into various products. Some investigations find problems with products. Some do not. A manufacturer should be able to draw some comfort from the fact that a federal agency with expertise in the field concluded that a product was not defective, at least to the extent that it confirms the manufacturer's belief it was producing a safe product. Affirming the trial judge's decision to permit a punitive damages claim to go to the jury denies manufacturers that protection because it permitted the jury to find the manufacturer consciously indifferent to an extreme risk of harm despite a federal agency's previous finding that the manufacturer had not done anything wrong.

Moreover, a primary basis for the punitive damages claim in this case was the testimony of an expert whose opinion has been specifically rejected by both the

federal agency responsible for automotive safety and by several courts. Where a manufacturer has a good faith, reasonable belief that a product is not defective, the existence of a contrary opinion – particularly one rejected by the relevant safety agency – should not be enough to permit punitive damages. Allowing the punitive damages to stand in this case would thus permit punitive damages in any products liability case, a result contrary to Missouri law, which provides punitive damages are to be awarded sparingly and only in the most egregious of circumstances.

JURISDICTIONAL STATEMENT

Amicus Curiae Product Liability Advisory Council, Inc. and Missouri Organization of Defense Lawyers adopt Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

Amicus Curiae Product Liability Advisory Council, Inc. and Missouri Organization of Defense Lawyers adopt Appellant's Statement of Facts.

POINTS RELIED ON

POINT RELIED ON NO. 1: The Trial Court Erred In Admitting Evidence Of Other Incidents Of Indeterminate Cause Because Anecdotal Evidence Of Other Claims Does Not Tend To Prove A Defect Or Notice In That Individual Accidents Are Not Relevant To Establish A Defect, Evidence Of Other Incidents Were Not Admissible To Show Notice, And A Heightened Degree Of Similarity Is Required To Establish A Punitive Damages Claim.

A. Individual Accidents Are Ordinarily Not Relevant to Establish A Defect.

B. Evidence of Other Incidents Were Not Admissible To Show Notice.

C. A Heightened Degree Of Similarity Is Required Where Other Incidents Are Offered To Establish A Punitive Damages Claim.

Forrest v. Beloit Corp., 424 F.3d 344 (3rd Cir. 2005)

Jone v. Coleman Corp., 183 S.W.3d 600 (Mo. Ct. App. 2005)

Nissan Motor Co. v. Armstrong, 145 S.W.3d 131 (Tex. 2004)

State Farm Mut. Auto. Ins. v. Campbell, 123 S. Ct. 1513, 1520 (2003)

POINT RELIED ON NO. 2: The Trial Court Erred In Not Entering Judgment As A Matter Of Law In Appellant's Favor On The Punitive Damages Claim Because Punitive Damages Are Inappropriate Where A Federal Safety Agency Investigates The Product And Concludes It Is Not Defective And Where There Is, At Most, A Disagreement Between The Federal Agency And Plaintiff's Expert In That The Manufacturer Cannot Be Said To Have Acted With Complete Indifference To Or Conscious Disregard For The Safety Of Others.

A. Punitive Damages Should be Unavailable Where A Safety Agency Investigates The Alleged Misconduct And Determines That The Manufacturer Did Nothing Wrong Because A Manufacturer Should Be Entitled To Rely On The Reasoned Judgment of That Agency.

B. An Expert's Generally Unaccepted Opinion Disagreeing With the Findings Of A Safety Agency Or Manufacturer Should Not Be A Sufficient Basis For Punitive Damages.

Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226, 249 (Mo. 2001)

Ford v. GACS, Inc., 265 F.3d 672, 678 (8th Cir. (Mo.) 2001)

Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. 1996)

Walker v. Gateway Nat'l. Bank, 799 S.W.2d 614 (Mo. Ct. App. 1990)

SUMMARY OF THE ARGUMENT

Evidence of other incidents has been a remarkable antidote for the ills of an otherwise unpersuasive products liability claim. Gaps in proof of defect or causation can be swept away with a closing argument saying: "the same thing happened before, therefore, something must be wrong." When seeking punitive damages in such cases, even if there is no direct evidence of reprehensible conduct by the manufacturer, a plaintiff's attorney armed with other incidents can simply add a few words to the closing: "the defendant knew the same thing happened before and didn't do anything about it. They deserve to be punished so they don't do it again."

The effect of this evidence is thus clear: a lawyer armed with other incident evidence has "a tactical nuclear weapon" at his disposal. Michael Hoenig, Products Liability: Evidence of Other Accidents -- Part II, NEW YORK LAW Journal, July 14, 1997, at 3. Lest there be any doubt, a prominent plaintiff's lawyer endorsed this theme, stating other incident evidence is "the most powerful weapon in the plaintiff attorney's arsenal for persuading the jury that a vehicle is defective." Tab Turner, Proving Design Defects With Other Similar Incidents Evidence, 35-Mar TRIAL 42, 42 (Mar. 1999). See also Francis H. Hare, Jr., Admissibility of Evidence Concerning Other Similar Incidents in a Defective Design Product Case: Courts Should Determine "Similarity" by Reference to the Defect Involved, 21 Am. J. Trial Advoc. 491, 494, 504, 522 (Spring 1998)

(evidence of other accidents "is arguably the single most important category of evidence available to the plaintiff in a defective design product case," the "strongest evidence the plaintiff can adduce," and often "vital" to the plaintiff's case).

The plaintiffs' bar seems to have gotten the message. A quick search of the federal and national reporters reveals scores of products liability cases involving the admissibility of other incidents.

The problem, however, is that standing alone, the existence of one other accident, a dozen, or a hundred, proves only that there was an accident or accidents, but proves little or nothing about whether a product is defective. In fact, given the variety of situations in which accidents occur, other incident evidence is ordinarily irrelevant to either the defect or notice determinations. Because other incident evidence is a component of most products liability actions today, amici submit this brief to further expand on these issues.

In addition, this case involves a massive punitive damages award against an automobile manufacturer based on a defect allegation that has been extensively studied and conclusively rejected by an agency of the federal government – the National Highway Traffic Safety Administration ("NHTSA"). Amici submit that NHTSA's conclusions, although not legally dispositive of the underlying defect claim, should bar the punitive damages claim asserted here, particularly since they demonstrate the existence of a good faith dispute between Plaintiff's expert on the one hand, and the remainder of the scientific and engineering community on the other.

ARGUMENT

I. POINT RELIED ON NO. 1: The Trial Court Erred In Admitting Evidence Of Other Incidents Of Indeterminate Cause Because Anecdotal Evidence Of Other Claims Does Not Tend To Prove A Defect Or Notice In That Individual Accidents Are Not Relevant To Establish Defect, Evidence Of Other Incidents Were Not Admissible To Show Notice, And A Heightened Degree Of Similarity Is Required To Establish A Punitive Damages Claim.

Evidence of prior occurrences is admitted with considerable caution because such "evidence … threatens to raise extraneous controversial issues, confuse the issues, and be more prejudicial than probative." Lovett v. Union Pac. R.R. Co., 201 F.3d 1074, 1081 (8th Cir. 2000). One common refrain is that only substantially similar individual incidents can be potentially relevant to the issues in a products liability case. See Jone v. Coleman Corp., 183 S.W.3d 600 (Mo. Ct. App. 2005) (citing cases). To qualify as substantially similar, each incident "must be (i) of like character; (ii) occur under substantially the same circumstances, and (iii) result from the same cause." Id. at 610.[1]

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[1] See also Drabik v. Stanley-Bostich, Inc., 997 F.2d 496, 508-09 (8th Cir. 1993) (excluding evidence of accidents involving other products); Lolie v. Ohio Brass Co., 502 F.2d 741, 745 (7th Cir. 1974) (excluding evidence involving products not of the same quality or characteristics); Prashker v. Beech Aircraft Corp., 258 F.2d 602, 608-09 (3d Cir. 1958) (excluding evidence of accidents involving "other models").

However, “substantial similarity” should not be viewed in a vacuum. Doing so obscures the fact that the ultimate question is relevance, and that "substantial similarity" is fundamentally merely an inquiry about whether the evidence is relevant. Black v. M & W Gear Co., 269 F.3d 1220, 1229 (10th Cir. 2001) ("It is clear that the substantial similarity requirement derives from relevance concerns."); Trull v. Volkswagen of Am., 187 F.3d 88, 98, fn. 9 (1st Cir. 1999) ("At bottom, the 'substantial similarity' requirement is a more particularized approach to the requirement that evidence be probative."). If relevant, the similarity of the circumstances may also affect the assessment of the potential for unfair prejudice, juror confusion or introduction of collateral matters. See, e.g., Govreau v. Nu-Way Concrete Forms, 73 S.W.3d 737, 742 (Mo. Ct. App. 2002) (“Exclusion of evidence of other injuries is demanded when the evidence introduced raises many new controversial points, leads to a confusion of issues, or presents undue prejudice disproportionate to its usefulness.”).[2]

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[2] See also Brooks v. Chrysler Corp., 786 F.2d 1191, 1198 (D.C. Cir. 1986) (affirming exclusion of questionnaire containing customer complaints as “unfairly prejudicial” because “Chrysler would have attempted to rebut the substance of each of the 330 complaints or to distinguish the nature of the complaints contained therein from the alleged defect in this case”); Uitts v. General Motors Corp., 411 F. Supp. 1380, 1383 (E.D. Pa. 1974) (“Proof of prior accidents or occurrences are not easily admitted into evidence, since they can often result in unfair prejudice, consumption of time and distraction of the jury to collateral matters.”).

Thus, trial courts must make a number of determinations before admitting other incidents. They must determine whether the other incident is potentially relevant to the issues in the case. Part (but only part) of that analysis is determining whether the other incident is substantially similar. Courts must also balance the relevance (if any) against the unfair prejudice caused to the defendant. As discussed below, individual other incidents rarely make the grade.

A. Individual Accidents Are Ordinarily Not Relevant To Establish A Defect.

Although various Missouri cases have stated loosely that substantially similar other incidents are admissible on certain issues, e.g., Newman v. Ford Motor Co., 975 S.W.2d 147, 151 (Mo. 1998) ("Trial courts have wide discretion on issues of admission of evidence of similar occurrences"), the true test of relevance is whether the evidence makes a fact in issue more probable. See Kansas City v. Keene Corp., 855 S.W.2d 360, 367 (Mo. 1993) ("The test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other evidence."). Unless it is true (which it is not) that other similar incidents are always relevant in a product liability action, broad statements in Newman and other cases about the admissibility of other similar incidents must be dicta.

Here, the primary disputed issues are defect and causation – did the Cutlass accelerate because of a transient signal that bypassed several protective devices in the vehicle (Plaintiff's defect theory), or because Mr. Peters pressed the accelerator (General Motors' theory). Even if Plaintiff presented evidence of another incident exactly like this

one, it would not shed any light on these questions. When the cause or causes of the other incidents are as uncertain as the cause of the incident being litigated, the other incidents lack probative value and are irrelevant:

> Accidents can happen in a multitude of ways and the mere fact that an accident has occurred with a product does not mean that the product was defective. . . Allowing the mere existence of a previous accident to be used in the pending suit as evidence of a product defect, however, is tantamount to saying that because the other accident occurred first, it can now be used as evidence of a product defect, even though it could not have been so used in a claim arising from the previous accident. Such a distinction based upon the priority of the occurrence is an artificial and illogical one.

Robert Sachs, "Other Accident" Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?, 49 Okla. L. Rev. 257, 270 (1996).

The recent Texas Supreme Court decision in Nissan Motor Co. v. Armstrong, 145 S.W.3d 131 (Tex. 2004), is instructive. Like this case, Armstrong involved an unintended acceleration claim. The plaintiff alleged that she "barely touched" the accelerator of her Nissan 300ZX, the car "took off" backwards and hit a brick building, even though she was pressing the brake pedal as hard as she could. When she shifted into drive, and again "barely touched" the accelerator, the car "shot forward" and struck a telephone pole, again despite application of the brakes. The vehicle was repaired, and six months later, a family friend had an unintended acceleration incident. A

repairman speculated that the accelerations may have been caused by a jammed throttle cable. Id. at 134.

The plaintiff brought a products liability claim against Nissan claiming the throttle cable was defective. Plaintiff offered expert testimony, and was permitted to present testimony from four other owners who had experienced unintended acceleration in 300ZX cars, 16 written reports of unintended acceleration, and Nissan's database of 757 consumer complaints. Nissan's objections to most of this evidence on grounds of hearsay, relevance, and incompetence were overruled. The jury found for plaintiff.

The Supreme Court reversed. The court began its analysis with the proposition: "it [is] not enough that a vehicle accelerated when claimants swore they had done nothing. Instead, we have consistently required competent expert testimony and objective proof that a defect caused the acceleration. The courts of appeals have done the same, holding liability cannot be based on unintended acceleration alone, on lay testimony regarding its cause, or on defects not confirmed by actual inspection." Id. at 137 (footnotes omitted). The court explained that "[t]hese requirements are especially compelling in unintended acceleration cases. Not only are there many potential causes (from floor mats to cruise control), but one of the most frequent causes (inadvertently stepping on the wrong pedal) is untraceable and unknown to the person who did it. Accordingly, we again affirm that the mere occurrence of an unintended acceleration incident is no evidence that a vehicle is defective." Id.

Turning to the admissibility of Nissan's database of consumer complaints, the court held such evidence was inadmissible. First, the evidence was hearsay and

double hearsay: “Complaint letters in a manufacturer's files may be true, but they also may be accusatory and self-serving; they are rarely under oath and never subject to cross-examination. As they are necessarily out-of-court statements, they are hearsay if offered to prove the truth of the assertions therein--that the incidents complained of occurred as reported.” Id. at 139-40 (footnotes omitted).

Second, the Court found that there was nothing in the database to suggest that an alleged defect in causing the 757 other incidents was similar to any of the defects alleged by the plaintiff. By the same token, the Court also rejected the conclusion that "the sheer number and nature of reported incidents raise an inference that the unintended acceleration or stuck throttle was caused by something other than driver error." Id. at 141. The Court reasoned: “In other words, because many people claimed their cars took off on their own, it is less likely that any of them were mistaken. This, of course, is not true. The sheer number of auto accidents in America raises no inference that most have nothing to do with drivers' mistakes. Moreover, it is using hearsay for the truth asserted -- the more hearsay there is, then the more likely it must be right.” Id. (emphasis added).

The Court next held that testimony from four drivers who had experienced unintended acceleration was inadmissible. The Court reasoned: “None of the four lay witnesses could verify a defect as the cause of their acceleration incidents, much less a defect similar to that alleged by Armstrong. Other than having accidents they described as unintended acceleration, these owners could show no similarity between their experiences and those involved in Armstrong's suit. As with documentary evidence, testimonial evidence of unintended acceleration is no evidence of a defect. Id. at 143.

Accordingly, in reversing for a new trial, the Court reiterated that "proof of unintended acceleration is not proof of a defect. Under that rule, proof of many instances of unintended acceleration cannot prove a defect either; a lot of no evidence is still no evidence." Id. at 148 (footnote omitted).

Assuming Plaintiff was able to present non-hearsay evidence of one or more incidents of unintended acceleration in a 1993 Oldsmobile Cutlass that were substantially similar to conditions that allegedly occurred in Mr. Peters' accident (which they could not), such anecdotal evidence of another similar incident would not be relevant or admissible because it would not make any material fact in this action more or less likely. The other incident or incidents had, at a minimum, the same range of potential causes as this incident, if not more (other causes such as improper maintenance, a different alleged defect, etc.), and did not make either theory asserted here any more likely. Because the unintended acceleration may or may not be caused by a product defect, the other such incidents, even if facially similar to Plaintiffs' accident, are not relevant in this action and should not have been admitted.

Nor can a systematic design defect be inferred from the occurrence of other similar accidents. The number of similar incidents of unintended accelerations represent a miniscule number in relation to the number of 1993 Cutlass vehicles in use and the number of times they have been driven safely. The mere happening of similar incidents of uncertain cause, out of thousands of product uses, does not make the existence of a design defect more probable. See Loitz v. Remington Arms Co., 563 N.E.2d 397 (Ill. 1990) ("The prior accidents must be considered not only in relation to the number of

barrels produced . . . but also in relation to the estimated number of times those guns would have been used. . . . the prior explosions represent a small percentage . . . and the plaintiff is not claiming that every mishap must be attributed to the allegedly defective nature of the Model 1100 shotgun.").

As the Third Circuit recently explained in Forrest v. Beloit Corp., 424 F.3d 344 (3rd Cir. 2005), in the context of anecdotal evidence about the absence of a similar incident on a particular unit of a mass produced product, the inferences that a jury might draw from such limited information about the safety history of a product is more likely to result from unfair prejudice, than from any probative value it might have:

> [T]he disputed testimony leaves us no way of knowing whether the absence of prior accidents involving the Jefferson-Smurfitt Gloss Calendar was an aberration, as opposed to a typical example of industry experience with substantially identical Beloit Gloss Calendars.
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> * * *
>
> Thus, to the extent an inference concerning the safety of the product's design can be drawn from a product's safety history, the reliability of such an inference is determined in large measure by the scope of the available safety history information. Here, of course, the information relied upon by Beloit does not cover all of Beloit's prior Gloss Calenders, or even a majority of them. Thus, to the extent this evidence could lead the jury to an inference concerning the overall safety of Beloit's Gloss Calender design, we cannot discount the possibility that the inference would be based on

either false assumptions, unsupported speculation, or both.

424 F.3d at 359-60 (emphasis added). Exactly the same reasoning applies to anecdotal evidence about the occurrence of a specific other incident involving one unit of a mass produced product. It tells the jury little or nothing about the relative safety of the product design.

Because unintended acceleration generally, and the acceleration in this case in particular, can occur for reasons other than a product defect, other incidents have no probative value in establishing defect or causation. Therefore, other incidents of unintended acceleration, even if appearing to be similar to the accident alleged in this case, are irrelevant and should have been excluded from evidence.[3]

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[3] As Forrest suggests, evidence about the safety history of product, to be fairly probative, generally should not be anecdotal evidence of specific other incidents, but competent statistical evidence tending showing whether an abnormal degree of risk is associated with a particular product design. Under Missouri law, a product is defective when, "because of the way it is designed – [it] creates an unreasonable risk of danger to the consumer or user when put to normal use." Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 375 (Mo. 1986). Here, the magnitude of risk of the Cutlass's propensity to unintentionally accelerate has necessarily been put at issue by the plaintiff's allegations. Competent statistical evidence showing the rate of occurrence of unintended acceleration incidents as compared to other vehicle designs under similar circumstances may be relevant to that determination. See Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d

B. Evidence Of Other Incidents Were Not Admissible To Show Notice.

The mere fact that an accident happens or an injury occurs while a product is being used does not mean that a product is defective or unreasonably dangerous. See Baker v. Int'l Harvester Co., 660 S.W.2d 21, 23 (Mo. Ct. App. 1983) (a manufacturer does not have a duty to design an accident proof product). It follows that mere notice of an accident cannot constitute notice of a defect. For that reason, evidence of other incidents – especially hearsay evidence – should not be admissible on the question of notice.

Again, the Texas decision in Armstrong is instructive. There, the Court rejected the conclusion that Nissan's customer complaint database was relevant to show notice or knowledge of the dangerous condition. 145 S.W.3d at 141. The Court held that the court of appeals found "the hearsay was admissible not for the truth of the matters asserted, but to show Nissan's knowledge of the truth of the matters asserted. The hearsay rules cannot be avoided by this kind of circular reasoning." Id. at 141-42. The Court summed up: "product defects must be proved; they cannot simply be inferred from a large number of complaints. If the rule were otherwise, product claims would become a

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898, 901 (7th Cir. 1994) ("Both the lawyers and the experts seemed to think that "defect" is a question of first principles, to be resolved by jurors as if they were engineers designing the first truck in the world rather than observers asking whether the design of a particular truck unduly increased the risk of injury. Jurors are not engineers, and data on accident rates speak more loudly than abstract arguments.")

self-fulfilling prophecy--the more that are made, the more likely all must be true." Id. at 142. See also Jone, 183 S.W.3d at 610 ("After reviewing the CPSC reports, we do not find that the trial court abused its discretion. The reports reflect that in each of these incidences there was inadequate ventilation. Further, not all of the incidences occurred in a tent and the type and size of the propane canister involved in the incidences were different. While the CPSC reports involved deaths and injuries resulting from a propane appliance emitting fatal amounts of carbon monoxide, the relevance of this evidence to show that Coleman was on notice that its warning was inadequate in that it was aware that people have died from propane-fueled appliances inside small enclosures does not outweigh the prejudice to Coleman.")

Here, Plaintiff introduced evidence of an enormous number of customer complaints of unintended acceleration in General Motors vehicles (the 1241 Reports). As in Armstrong, each of those other unintended acceleration incidents had numerous potential causes, including additional causes not alleged here.

Clearly, then, these accidents cannot constitute notice or evidence of the specific defect alleged by Plaintiff here – or any defect – as the cause of those other incidents may have been different and unrelated to product design. See generally Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 622 (D.N.J. 1982) (excluding evidence of other accidents because "[a] detailed analysis would have to be made of each complaint in order to determine whether the facts were similar enough to ... [plaintiff's] complaint to constitute notice to defendants of the particular problem with ... [the product involved]

that is the subject of this litigation"). Any other rule would elevate the fact of an accident into the conclusion of a defect, contrary to Missouri law.

C. A Heightened Degree Of Similarity Is Required Where Other Incidents Are Offered To Establish A Punitive Damages Claim.

Plaintiffs often seek to establish punitive damages claims by arguing the defendant knew about other incidents, but did nothing about them. This is no surprise; in a products liability claim, to recover punitive damages, "the plaintiff must present evidence that the defendant placed an unreasonably dangerous product into the stream of commerce with actual knowledge of the defect." Jone, 183 S.W.3d at 610 (emphasis added).

As discussed above, as a starting point, knowledge of another incident does not translate into knowledge of a defect. For punitive damages claims, additional rules of a constitutional dimension come into play. Because of the due process concerns associated with punitive damages claims, proof of relevance and substantial similarity of other incidents needs to be far greater than in a simple negligence or products liability case.

Punitive damages are "quasi-criminal" and "operate as 'private fines' intended to punish the defendant and deter future wrongdoing." Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001). "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." State Farm Mut. Auto. Ins. v. Campbell, 123 S. Ct. 1513, 1520 (2003). See also Pacific Mut.

Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("We note once again our concern about punitive damages that 'run wild.'"); Kansas City v. Keene Corp., 855 S.W.2d 360, 377 (Mo. 1993) (Holstein, J., concurring) (stating "punitive damages have occasionally been abused by becoming a method for redistributing wealth rather than carrying out the functions for which punitive damages were designed.").

Thus, claims for punitive damages must be subjected to stringent procedural and substantive safeguards. The Supreme Court has "strongly emphasized the importance of the procedural component of the Due Process Clause" in dealing with punitive damages issues. Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994). See also Hess v. Chase Manhattan Bank USA, N.A., Nos. WD 64370, WD 64407, 2006 WL 768513, at *10 (Mo. Ct. App. Mar. 28, 2006) ("Punitive damages are penal in nature in that their purpose is to 'further society's interests of punishing unlawful conduct and deterring its repetition' and 'is an exercise of state power' implicating due process."). "Because punitive damages are extraordinary and harsh …, a higher standard of proof is required: For common law punitive damage claims, the evidence must meet the clear and convincing standard of proof." Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. 1996)

As part of the analysis, the U.S. Supreme Court has made clear that due process requires there to be a nexus between the conduct that caused the underlying injury and the imposition of punitive damages. Campbell, 123 S. Ct. 1513. That is, to recover punitive damages, Plaintiff must demonstrate "some understandable relationship" between the conduct justifying an award of punitive damages and the injury Plaintiff

allegedly suffered. Haslip, 499 U.S. at 21. As such, "[a] defendant's dissimilar acts, independent from the acts upon which liability [to the plaintiff is] premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." Campbell, 123 S. Ct. at 1523. See also Haslip, 499 U.S. at 19.

Accordingly, the recovery of punitive damages must reflect the impact of the defendant's conduct on, and the actual harm resulting to, a particular plaintiff. A punitive damages claim cannot be based on miscellaneous bad acts that are unrelated to the individual's underlying compensatory damages claim. Campbell, 123 S. Ct. at 1524 (even where punitive damages are at issue, courts may not "expand the scope of the case so that a defendant may be punished for any malfeasance").

Thus, if a high degree of substantial similarity of other accidents is required to prove a defect or causation, if anything, an even higher degree of similarity should be required when plaintiff offers other incidents to prove notice for purposes of punitive damages, particularly since the clear and convincing evidence rule applies. The risk of a contrary rule is that a defendant could be punished for purported knowledge of a generic defect or knowledge of incidents unrelated to a defect, not necessarily the defect alleged, and thus exposed to punitive damages for conduct that did not injure the plaintiff. Such a result is clearly proscribed by Campbell and the Fourteenth Amendment.

In light thereof, while plaintiff may argue that a "lesser" degree of similarity applies to notice generally,[4] Missouri courts have recognized the high degree of similarity of other incidents required for proof of defect and causation; and pursuant to the due process clause, an extraordinarily high degree of similarity is required to show notice with regard to punitive damages claims. Assuming for the sake of argument that a plaintiff offered different categories of other incidents that met one test or another, the judge and jury would be given very difficult tasks: the judge must create a number of limiting instructions defining for what purpose each category of other incident may be considered, and the jury must manage to keep it all straight – a difficult task when the closing argument is simply "the defendant knew the same thing happened before and didn't do anything about it."

There is, of course, a simple solution to this muddle: require a plaintiff to prove his or her case on the merits of the design, without reference to individual other incidents having the same range of uncertain causes. Only competent statistical evidence tending to prove or disprove a higher degree of risk associated with a particular product

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[4] Case law suggests that a lesser standard of similarity is required where other incidents are offered to prove notice. E.g., Stacy v. Truman Med. Ctr., 836 S.W.2d 911, 926 (Mo. 1992). While this may make some sense in a simple negligence action, it makes little or no sense in a products liability action where the ultimate issue to be proven is the existence of a product defect, and as shown above, other incidents of indeterminate cause have no relevance to that determination. See Armstrong, 145 S.W.3d at 142.

design should be permissible. The risk of juror confusion, coupled with the serious due process and substantive law concerns applicable requires no less.

II. POINT RELIED ON NO. 2: The Trial Court Erred In Not Entering Judgment As A Matter Of Law In Appellant's Favor On The Punitive Damages Claim Because Punitive Damages Are Inappropriate Where A Federal Safety Agency Investigates The Product And Concludes It Is Not Defective And Where There Is, At Most, A Disagreement Between The Federal Agency And Plaintiff's Expert In That The Manufacturer Cannot Be Said To Have Acted With Complete Indifference To Or Conscious Disregard For The Safety Of Others.

Unintended acceleration may be the most extensively investigated phenomenon in the history of the automobile industry. By 1989, it had been the subject of more than 100 separate investigations by the National Highway Safety Administrations ("NHTSA") involving more than 20 manufacturers. See NHTSA's "An Examination of Sudden Acceleration," p.1 DEX1062.[5] NHTSA's investigations have

[5] NHTSA is the federal agency charged by Congress to promulgate safety standards to meet the need for motor vehicle safety and is the agency principally charged with investigating potential or alleged safety-related defects in motor vehicles in the U.S. See 49 C.F.R. §§ 554.1 to -.11. This Court has indicated that reports from NHTSA are entitled to great credibility. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 58 (Mo. 1999) ("The fact that the reports were generated by a government entity that is presumably independent and unbiased and whose ultimate function is to protect the

repeatedly rejected the existence of a product defect and instead concluded that driver error is the principal cause of the accidents. Moreover, NHTSA and safety agencies in other countries have investigated reports of unintended acceleration in almost all makes and models of passenger vehicles. NHTSA reviewed these reports of sudden acceleration, including those conducted by foreign agencies, and concluded the major cause of such incidents has been pedal misapplication -- drivers unknowingly depressing the accelerator instead of the brake pedal. Id. at 49. NHTSA rejected the claim that intermittent transient electric signals could both cause the vehicle to accelerate and simultaneously override the various safety components in the vehicle without leaving any evidence that this occurred as "virtually impossible." (Id. at viii).

Despite NHTSA's 1989 findings, made after a year-long study by independent experts in the field of automotive engineering and electronics, over the next ten years, Sam Sero, a consultant hired by plaintiffs' lawyers in product liability lawsuits (and Plaintiff's expert in this case) continued to express the theory that had been rejected by NHTSA: transient electrical signals could cause a speed control system to malfunction resulting in a unintended acceleration. In July 1999, a plaintiff's lawyer from Arkansas, Sandy McMath, petitioned NHTSA to reopen its investigation into of sudden acceleration. See 65 Fed. Reg. 250 26-01 (Apr. 6, 2000). Among other things, McMath

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public by seeking out product defects, if they exist, gave the reports great credibility."). See also Eltiste v. Ford Motor Co., 167 S.W.3d 742, 749 (Mo. Ct. App. 2005). (NHTSA's investigation into unintended accelerations was admissible).

charged that in the 1989 study, NHTSA neglected to consider certain failure modes of the speed control system, and failed to address the fact that there is no true failsafe mechanism to overcome sudden acceleration.

In its denial of the petition, NHTSA refuted each and every one of the charges as factually incorrect or scientifically unsupportable. NHTSA also specifically rejected Sero's defect theory:

> There are two problems with Mr. Sero's claim: first, as we've described earlier, the servo is mechanically limited so that it will only open the throttle approximately 80% of "wide open throttle;" and, secondly, Mr. Sero's theory ignores two key elements of an alleged cruise-control related SAI-- mechanical failures of both the MVDV and vehicle brake system. To conclude that his theory adequately explains a SAI, an assumption must be made that not only did a simultaneous electrical failure occur involving the servo solenoid ground circuits but mechanical failure of the MVDV and brake system occurred as well. Therefore, Mr. Sero's belief that inadvertent cruise control servo solenoid activation explains SAIs is, at best, theoretical, where "theory" is defined as "a proposed explanation whose status is still conjectural, in contrast to well-established propositions that are regarded as reporting matters of actual fact." (Id. at 12-13)

In light of NHTSA's findings, a New York court recently held that Sero was incompetent to testify in a sudden acceleration case. Specifically, the trial court found that Sero's defect theory "was not generally accepted in the scientific or

engineering community." Rodriguez v. Ford Motor Co., et al., Case No. 15703/99 (N.Y. Sup. Ct. Trial Div. Bronx County) (Oct. 30, 2003). The court concluded "[n]ot only has plaintiff's theory not been generally accepted, it has been examined and rejected twice by [NHTSA], even after a lawyer on behalf of another plaintiff submitted much of the same evidence as that is being offered here." (Id. at 2). The appellate court affirmed on the basis that "[p]rior to granting Ford's request to exclude plaintiff's expert from testifying about his transient signal theory, the court conducted a lengthy hearing on the proposed evidence, where it was clearly revealed that the theory propounded had never been examined by the witness's engineering peers, much less widely accepted in the scientific community. Thus, the exclusion of such expert testimony was not an improvident exercise of discretion." Rodriguez v. Ford Motor Co., 792 N.Y.S.2d 468, 470 (N.Y. App. Div. 2005). See also Cox v. Delgado, No. 97CV6286 (D. Colo. Apr. 16, 1999) (LF 2013) (Sero's theory "has not been tested as reliable in any other situations or by any other expert knowledgeable in the field"); Smith v. Ford Motor Co., No. 98-CV-306-D (D. Wy. Feb. 24, 2000) (LF 2006) (Sero's theory does not satisfy "the basic requirements of Daubert.").

Under these facts and like factual scenarios, as a matter of law, punitive damages should not be appropriate against a manufacturer who simply failed to cure a defect that neither the manufacturer nor the federal government could find. This is particularly true where the safety agency charged with regulating the product has specifically rejected the precise theory being offered in this case.

A. Punitive Damages Should Be Unavailable Where A Safety Agency Investigates The Alleged Misconduct And Determines That The Manufacturer Did Nothing Wrong Because A Manufacturer Should Be Entitled To Rely On The Reasoned Judgment Of That Agency.

As noted above, punitive damages are an extraordinary, quasi-criminal remedy. They are intended to punish a defendant who has engaged in outrageous, malicious, or otherwise morally culpable conduct, and to deter similar conduct in the future. See Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 164-65 (Mo. Ct. App. 1997) (Punitive damages are imposed for the purpose of punishment and deterrence); Id. (to recover punitive damages under both negligence and strict liability theories, the plaintiff must demonstrate that the defendant showed a complete indifference to or conscious disregard for the safety of others); White v. James, 848 S.W.2d 577 (Mo. Ct. App. 1993) ("Punitive damages are appropriate only where the conduct of defendant is outrageous because of defendant's evil motive or reckless indifference to the rights of others.").

Punitive damages are not appropriate where the defendant was simply wrong, made a mistake, or was negligent. Litchfield v. May Dep't. Stores Co., 845 S.W.2d 596 (Mo. Ct. App. 1992) ("Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence."). Thus, where a defendant has a good faith belief that its conduct was appropriate, punitive damages should not be available because it would be impossible for the plaintiff to demonstrate the requisite state of mind necessary to impose those

damages. This is particularly true where the defendant's good faith belief is supported by the judgment of the regulatory body whose mission is to investigate the defendant's conduct, or, in the case of NHTSA, to ensure the safety of the defendant's product. See Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226, 249 (Mo. 2001) ("Conformity with the regulatory process does negate the conclusion that the [defendant's] conduct was tantamount to intentional wrongdoing."). See also Gaffney v. Community Fed. Sav. & Loan Ass'n, 706 S.W.2d 530, 535 (Mo. Ct. App. 1986) ("If the defendant acted in good faith on the honest belief his act was lawful, he is not liable for punitive damages, even though he may have been mistaken as to the legality of his act.").

Walker v. Gateway Nat'l. Bank, 799 S.W.2d 614 (Mo. Ct. App. 1990), is instructive. In that case, the plaintiff sought punitive damages for the alleged conversion of proceeds from a certificate of deposit. The defendant presented evidence that it removed the funds from plaintiff's certificate of deposit while acting on the advice of counsel and with the good faith belief the bank had a right of setoff. The Court of Appeals ruled the evidence failed to show a reckless disregard for plaintiff's rights. Id. at 617.

Thus, proceeding in accordance with a good faith, reasoned belief and the advice of counsel that a bank was entitled to funds precluded a punitive damages award as a matter of law. It no doubt follows that punitive damages are unavailable against General Motors on the same basis. General Motors proceeded on a good faith, reasoned belief that its product was not defective. General Motors had the "advice" (in the form of NHTSA's repeated rejection of defect petitions and its 1989 Closing Report) of NHTSA,

which reached the same conclusion. See Miles v. Ford Motor Co., 922 S.W.2d 572, 589 (Tex. App. 1996) ("When a seller relies in good faith on the current state of the art in safety concerns, and the conclusions by the government agencies charges with administrating safety regulations in the area of this product that the product is not unreasonably dangerous, it cannot be said to have acted with the entire want of care showing conscious indifference to the safety of the product users, or to have acted with conscious indifference to an extreme degree of risk"), rev'd on other grounds, 967 S.W.2d 377 (Tex. 1998).

B. An Expert's Generally Unaccepted Opinion Disagreeing With The Findings Of A Safety Agency Or Manfucturer Should Not Be A Sufficient Basis For Punitive Damages.

The remedy of punitive damages is "so extraordinary or harsh that it should be applied only sparingly." Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 110 (Mo. 1996). As noted, a products liability defendant must have actual – as opposed to constructive - knowledge that its product was defective before punitive damages can be imposed in a products liability case. See Jone, 183 S.W.3d at 610. See also Ford v. GACS, Inc., 265 F.3d 672, 678 (8th Cir. (Mo.) 2001) ("a manufacturer does not necessarily act with the wantonness to support punitive damages by continuing to manufacture a product with the knowledge of some injuries").

This distinction is critical: the actual knowledge requirement means that punitive damages are appropriate only where it can be objectively shown that the defendant believed that the product was defective, or that no reasonable person could

conclude that a product was not defective. See generally Pollock v. Brown, 569 S.W.2d 724, 733 (Mo. 1978) (punitive damages not permitted for conduct found by the court to be unlawful where, without the benefit of the court's opinion, the defendant "might in good faith have determined" that its conduct was in fact lawful); Commercial Credit Corp. v. Blau, 393 S.W.2d 558, 567 (Mo. 1965) (no punitive damages for wrongful taking of automobiles where a mortgage "at least colorably gave [the party against whom punitive damages were sought] a superior right of possession). Where there is a reasonable dispute among engineers about the safety of a product, punitive damages are not appropriate. See Satcher v. Honda Motor Co., 52 F.3d 1311 (5th Cir. 1995) (punitive damages unavailable where there was a genuine dispute in the scientific community as to whether alternative design would do more harm than good); Hillrichs v. Avco Corp., 514 N.W.2d 94, 100 (Iowa 1994) (punitive damages inappropriate where "reasonable disagreement" exists over risks and utilities of product); Mercer v. Pittway Corp., 616 N.W.2d 602, 618 (Iowa 2000) (same); Burke v. Deere & Co., 6 F.3d 497, 511 (8th Cir. 1993) ("[a]n award of punitive damages is not appropriate when room exists for reasonable disagreement over the risks and utilities of the conduct at issue").

Here, the evidence establishes, at the very most, the existence of a reasonable disagreement over the existence of a defect permitting an unintended acceleration. On one side of this debate are the motor vehicle manufacturers and the safety regulators at NHTSA and other nations' automobile safety agencies, who have studied the issues for decades and rejected Plaintiff's theories as being scientifically

unsupportable. On the other side of the debate is Sam Sero – an expert whose opinion has been rejected by NHTSA and by courts.

That Sero disagrees with the federal government's safety regulators – and that of numerous automobile manufacturers and engineers – does not mean that General Motors engaged in outrageous, malicious, or otherwise morally culpable misconduct. Even if a jury could properly conclude that Sero was correct, and that General Motors could be found strictly liable or even negligent, it cannot be said that General Motors should be punished for believing the results of its own investigation and in relying on the investigations of the federal government and safety agencies in other countries. See Loitz v. Remington Arms Co., 563 N.E.2d 397, 405 (Il. 1990) ("While it is true that Remington was made aware of Dr. Levinson's opinion during the course of the prior case, it cannot be said that Remington was automatically required to embrace Dr. Levinson's view as its own."). Plaintiff's claim for punitive damages must fail under such circumstances.

Thus, while the jury may be free to conclude, on sufficient evidence, that NHTSA and General Motors were both wrong and the vehicle was defective, being wrong is not enough to support an award of punitive damages. See Litchfield 845 S.W. 2d 596. No reasonable jury could conclude, or should be permitted to conclude, that General Motors displayed a mental state so bad that it justifies punishment because it rejected Sero's theory and drew the same conclusion that NHTSA drew from the same evidence. General Motors was entitled to judgment as a matter of law on this claim.

CONCLUSION

Based on the foregoing discussion and authorities, judgment should be entered in General Motors' favor on the punitive damages claim. Introduction of other incidents was unfairly prejudicial and requires a new trial.

Respectfully Submitted,

SHOOK HARDY & BACON, L.L.P.

By:_____
Robert T. Adams, #34612

2555 Grand Blvd.
Kansas City, Missouri 64108
(816) 474-6550 (Phone)
(816) 421-5547 (Fax)

CARLTON FIELDS, P.A.
Wendy F. Lumish (*pro hac vice*)
Jeffrey A. Cohen (*pro hac vice*)
4000 International Place
100 SE 2nd Street
Miami, FL 33131
(305) 530-0050 (Phone)
(305) 530-0055 (Fax)

FORD, PARSHALL & BAKER, LLC
Susan Ford Robertson
P.O. Box 1097
609 E. Walnut
Columbia, MO 65205-1097
Phone: (573) 449-2613
Fax: (573) 875-8154

ATTORNEYS FOR AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND MISSOURI ORGANIZATION OF DEFENSE LAWYERS

RULE 84.06(c) CERTIFICATION

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) is this Brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b); and (3) this Brief contains 9,207 words, as calculated by the Microsoft Word software used to prepare this Brief.

Respectfully Submitted,

SHOOK HARDY & BACON, L.L.P.

By:_____
Robert T. Adams, #34612

2555 Grand Blvd.
Kansas City, Missouri 64108
(816) 474-6550 (Phone)
(816) 421-5547 (Fax)

CARLTON FIELDS, P.A.
Wendy F. Lumish (*pro hac vice*)
Jeffrey A. Cohen (*pro hac vice*)
4000 International Place
100 SE 2nd Street
Miami, FL 33131
(305) 530-0050 (Phone)
(305) 530-0055 (Fax)

FORD, PARSHALL & BAKER, LLC
Susan Ford Robertson
P.O. Box 1097
609 E. Walnut
Columbia, MO 65205-1097
Phone: (573) 449-2613
Fax: (573) 875-8154

ATTORNEYS FOR AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND MISSOURI ORGANIZATION OF DEFENSE LAWYERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk (that the undersigned certifies was scanned for viruses and is virus free) have been mailed, first class mail postage prepaid, on June 20, 2006, to:

Edward D. Robertson, Jr.
Anthony Louis Dewitt
715 Swifts Highway
Jefferson City, MO 65109

Mark J. Evans, Esq.
Brad Kuhlman, Esq.
Evans & Kuhlman
105 E. 5th Street, Suite 102
Kansas City, MO 64106

Michael Blanton, Esq.
1736 SE Embassy Drive
Lee's Summit, MO 64081

Terry L. Hickam, Esq.
4504 Hickory Lane
Blue Springs, MO 64015-4523

Dennis E. Davidson, Esq.
Law Office of Kenneth J. Berra
1100 Walnut, Suite 2950
Kansas City, MO 64106

ATTORNEYS FOR RESPONDENT

Rodney E. Loomer, Esq.
Wallace S. Squibb, Esq.
TURNER, REID, DUNCAN, LOOMER & PATTON, P.C.
PO Box 4043
Springfield, MO 65808
(417) 883-2102 (Phone)
(417) 883-5024 (Fax)

Ann K. Covington, Esq.
James F. Bennett, Esq.
BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, #3600
St. Louis, MO 63102
(314) 259-2000 (Phone)
(314) 259-2020 (Fax)

Frank M. Hinman, Esq.
Thomas S. Hixson, Esq.
Lee G. Sullivan, Esq.
Renee M. DuPree, Esq.
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000 (Phone)
(415) 393-2286 (Fax)

ATTORNEYS FOR APPELLANT
GENERAL MOTORS CORPORATION

_____
Robert T. Adams

IN THE SUPREME COURT OF MISSOURI
No. SC 87559

RANDALL D. PETERS, Individually
and as Next Friend for Constance Marie Peters,
Respondent,

v.

GENERAL MOTORS CORPORATION,
Appellant.

Appeal From the Circuit Court of Jackson County
Honorable Marco A. Roldan, Judge

APPENDIX TO BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

AND

MISSOURI ORGANIZATION OF DEFENSE LAWYERS IN SUPPORT OF APPELLANT

CARLTON FIELDS, P.A.
Wendy F. Lumish (*pro hac vice*)
Jeffrey A. Cohen (*pro hac vice*)
4000 International Place
100 SE 2nd Street
Miami, FL 33131
(305) 530-0050 (Phone)
(305) 530-0055 (Fax)

SHOOK HARDY & BACON, L.L.P.
Robert T. Adams
2555 Grand Blvd.
Kansas City, Missouri 64108
(816) 474-6550 (Phone)
(816) 421-5547 (Fax)

Attorneys for Amicus Curiae
Product Liability Advisory Council, Inc.

FORD, PARSHALL & BAKER, LLC
Susan Ford Robertson
P.O. Box 1097
609 E. Walnut
Columbia, MO 65205-1097
Phone: (573) 449-2613
Fax: (573) 875-8154
Attorney for Missouri Organization of Defense Lawyers

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